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Board of Governors of the Federal Reserve System
Attention: Jennifer J. Johnson, Secretary
20th Street and Constitution Avenue NW.
Washington, DC 20551

Office of the Comptroller of the Currency
250 E Street SW.
Mail Stop 2–3
Washington, DC 20219

Securities and Exchange Commission
Attention: Elizabeth M. Murphy, Secretary
100 F Street NE.
Washington, DC 20549

Commodity Futures Trading Commission
1155 21st Street, NW.
Washington, DC 20551

Federal Deposit Insurance Corporation
Attention: Robert E. Feldman, Executive Secretary
550 17th Street NW.
Washington, DC 20429

Our Ref: 0016665-0003560 NY:13352640.7

February 13, 2012

Re: Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds; Proposed Rule; 76 Federal Register 68846; November 7, 2011; Joint Notice and Request for Comment; OCC: Docket ID OCC–2011–14; FRB: Docket No. R–1432 and RIN 7100 AD 82; FDIC: RIN 3064–AD85; SEC: File Number S7–41–11; CFTC: RIN 3038–AD05

This letter is submitted on behalf of HSBC Life (International) Limited, a life insurance company incorporated in Bermuda which is authorized and regulated by the Hong Kong Commissioner of Insurance to carry on long-term insurance business in the jurisdiction of Hong Kong ("**HSBC**") in response to the request for comment on the proposed rule on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (the "**Proposed Rule**")[1] as issued by the Office of the Comptroller of the Currency (the "**OCC**"), Board of Governors of the Federal Reserve System (the "**Board**"), Federal Deposit Insurance Corporation (the "**FDIC**") and Securities and Exchange Commission (the "**SEC**") and the largely identical proposed rule on Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Covered Funds as issued by the Commodity Futures Trading Commission (the "**CFTC**" and, together with the OCC, the Board, the FDIC and the SEC, the "**Agencies**"). The Proposed Rule would implement section 619 ("**Section 619**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**DFA**").[2] HSBC welcomes the attention of the Agencies to the issues raised on the Proposed Rule and appreciates the opportunity to provide the comments below.

[1] 76 Fed. Reg. 68846 (November 7, 2011).
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (July 21, 2010). *See* Section 619, Prohibitions on proprietary trading and certain relationships with hedge funds and private equity funds.

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

THE PROPOSED RULE NEGATIVELY IMPACTS NON-US INSURANCE COMPANIES' ABILITY TO INVEST IN COVERED FUNDS

HSBC is an affiliate of HSBC Holdings plc. The HSBC Group is one of the largest banking and financial services organizations in the world and operates in five regions globally (including, in the United States, via its FDIC-insured entity, HSBC Bank USA, National Association). HSBC understands and respects the Agencies' efforts to protect the safety and soundness of the United States' financial system. However, HSBC is particularly concerned by the broad reach and potentially unintended consequences of the Proposed Rule on The HSBC Group's international insurance operations, and the international insurance operations of global financial institutions like itself operating outside of the United States.

In particular, HSBC would like to highlight concerns about the Proposed Rule's treatment of insurance companies regulated in sophisticated financial markets outside of the United States which would be "banking entities" subject to the provisions of the Proposed Rule. A number of separately regulated insurance companies incorporated and operating outside of the United States form part of the HSBC Group. These insurance entities would be subject to the Proposed Rule by virtue of being affiliated with HSBC Bank USA, National Association, even though such entities do not control, nor are they controlled by, the FDIC-insured entity.

SUMMARY

This letter highlights two main issues, each of which is explored in further detail below:

(1) addressing question 132 and others, the Agencies should explicitly acknowledge in the Proposed Rule that the proprietary trading exemption granted under subparagraph (d)(1)(F) of Section 619 to regulated insurance companies also covers investments in securities offered by covered funds; and

(2) in response to a number of questions posed in the Proposed Rule, the Agencies must clarify the applicability and scope of the foreign funds exemption.

1. CLARIFYING THE NATURAL APPLICATION OF THE INSURANCE EXEMPTION FOR COVERED FINANCIAL POSITIONS TO SECURITIES ISSUED BY COVERED FUNDS

1.1 Establishing the Congressional rationale for—and the Agencies' responsibilities in respect of—the insurance exemption

Congress has expressed a clear desire that Section 619 and the Proposed Rule should not impede the normal operations of regulated insurance companies. Giving effect to this desire, Section 619 lists among its "permitted activities" the "purchase, sale, acquisition, or disposition of securities and other instruments described generally under the rubric of proprietary trading by a regulated insurance company directly engaged in the business of insurance."

Explaining the rationale behind the exemption for regulated insurance companies, Senator Jeff Merkley explained that the **"Volcker Rule"**:

> is meant to accommodate the normal business of insurance at regulated insurance companies that are affiliated with banks. The Volcker Rule was *never meant to affect the ordinary business of insurance: the collection and investment of premiums, which are then used to satisfy claims of the insured.* These activities, while definitionally proprietary trading, are heavily regulated by State insurance regulators, and in most cases do not pose the same level of risk as other proprietary trading.[3]

[3] 156 Cong. Rec. S5896 (daily ed. July 15, 2010) (emphasis added). This reasoning aligns with Section 619's acknowledgement of "rules of international regulatory comity by permitting foreign banks, regulated and backed by foreign taxpayers, in the course of operating outside of the United States to engage in activities permitted under relevant foreign law."

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
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Merkley went on to state two limitations on this general rule, both of which were embodied in Section 619: (1) all exempt investment by a regulated insurance company must be "solely for [its] general account"[4]; and (2) the regulated insurance company must ensure that "the purchase, sale, acquisition or disposition is conducted in compliance with, and subject to, the insurance company investment laws, regulations and written guidance of the State or jurisdiction in which each such insurance company is domiciled."

Subsection (b)(1)(F) of Section 619 requires that the Agencies "appropriately accommodate the business of insurance within an insurance company" in implementing rules. Further, having undertaken its Congressionally-mandated study of the Volcker Rule, the Financial Stability Oversight Council ("**FSOC**") emphasized in its report that "the investment activity of insurers is central to the overall insurance business model."[5]

Indeed, insurance companies deploy investment strategies for a number of business-critical purposes, including risk management, diversification of exposure to various assets classes and managing asset flow. The business model for insurance companies requires an ability to manage their asset flow to match short-, medium- and long-term time horizons. As a general rule, insurance companies' liabilities are structured on a longer-term basis than those of other financial institutions. Moreover, unlike financial institutions with core lending and deposit functions, insurance companies are inherently less vulnerable to liquidity issues because their liabilities are structured on a longer-term basis. Therefore investing their liquidity is less risky and having the possibility to invest in long-term equity securities of the type represented often by private equity funds, and sometimes by hedge funds, allows insurance companies to match the maturity of their investments to their needs. As one of their primary functions, insurance regulators promulgate laws and regulations designed to ensure the foregoing goals and promote an insurance company's solvency for the benefit of its policyholders.

As explained further in the sub-sections below, Congress' intention that the Volcker Rule not impede this "ordinary business of insurance" will be materially compromised unless the Agencies confirm in the Proposed Rule that the insurance exemption allows investment by regulated insurance companies in securities issued by covered funds.

1.2 The text of Section 619 does not support the Agencies' approach of limiting the insurance company exemption to the proprietary trading restrictions

Introducing the Proposed Rule's approach to the insurance exemption, the Agencies state that "the proposed rule generally restates the statutory requirements of the exemption." The statutory requirements to which the Agencies refer are set out, as mentioned above, in subsection (d)(1)(F) of Section 619, which specifically exempts "the purchase, sale, acquisition or disposition of securities and other instruments described in subsection (h)(4)" by regulated insurance companies.

However, HSBC believes that the manner in which the Agencies have implemented the statutory requirement for an insurance company exemption is too narrow. Section 619(d) generally defines permitted activities and, in doing so, does not limit the granted exemptions expressly to proprietary trading. Moreover Section 619(d)(F) exempts from the prohibition under Section 619(a) "the purchase, sale, acquisition, or disposition of securities **and** other instruments described in subsection (h)(4) by a regulated insurance company." (emphasis added) HSBC believes that this exemption should be read as allowing insurance companies to invest in any securities, including securities issued by covered funds. Although the reference to "other instruments described in subsection (h)(4)" directs the reader to the definition of proprietary trading, we believe that the language clearly intended only to refer to the instruments listed in such definition (i.e., "any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative, or contract or any other

[4] Section 619, subparagraph (d)(1)(F).
[5] FSOC, *Study & Recommendations on Prohibitions on Proprietary Trading & Certain Relationships with Hedge Funds & Private Equity Funds*, at 71 (Jan. 2011) (the "**FSOC Study**").

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

security or financial instrument that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may, by rule as provided in subsection (b)(2) determine.") rather than implying that the exemption should only apply to proprietary trading in such instruments.

1.3 Clarify that in the context of the insurance exemption, the scope of "covered financial position" under the Proposed Rule includes securities issued by covered funds (questions 132, 135)

At subsection (h)(4), Congress defines "proprietary trading" to mean "engaging as a principal for the trading account of the banking entity ... in any transaction to purchase or sell, or otherwise acquire or dispose of, any security, any derivative, any contract of sale of a commodity for future delivery, any option on any such security, derivative or contract, or any other security or financial instrument" that the Agencies may wish to determine by rule. The definition's reference to "any security" is very broad and must be read to include shares in covered funds.[6]

Given an opportunity by Congress to further refine the definition of "proprietary trading," the Agencies define proprietary trading in the Proposed Rule as the purchase or sale of "covered financial positions"[7] and, in turn, classify "covered financial positions" in a manner that overlaps almost entirely with the items set out in subsection (h)(4) of Section 619. The broad reference to "security" is retained by the Agencies and expanded even further in the definition of "covered financial positions," including "any position, including any long, short, synthetic or other position, in ... a security,"[8] To limit the potential broadness of its definition, the Agencies specify that "covered financial position" does not include loans, commodities and foreign exchange or currency.[9] Again, because "security" must be understood so broadly and the Agencies have not specifically carved covered funds out of "covered financial positions," securities issued by covered funds fall within the scope of interests that are "covered financial positions."

The Proposed Rule's notions of "proprietary trading," "covered financial positions" and "security" all become crucially important when interpreting the scope of the insurance exemption. As explained, Section 619 allows regulated insurance companies to engage in proprietary trading, which in the Proposed Rule is interpreted to mean that such insurance companies which meet the requisite conditions (general account, subject to and in accordance with appropriate insurance oversight) can purchase and sell covered financial positions.[10] *Prima facie* this suggests that regulated insurance companies should be able to freely sell and purchase interests in covered funds.

Section 619 and the Proposed Rule contain a set of provisions separate from the provisions on proprietary trading that relate to "covered funds." Stated simply, the covered funds provisions (which, it should be noted, do not apply to U.S. mutual funds) create a world where a foreign banking entity (including regulated insurance companies that are affiliates of banking entities) can either invest in covered funds by falling within the strict confines of the foreign funds exemption (which would prohibit investment in many types of covered funds) or comply with the narrow conditions of investment in covered funds under the Volcker Rule (including the 3% rules and all other relevant restrictions).

[6] Because Section 619 has become part of Section 13 of the Bank Holding Company Act of 1956, as amended ("**BHCA**"), terms that are used but not defined under both it and the Proposed Rule must be read in a manner that is consistent with other definitions under the BHCA. To cite one example: Section 225.2(q) of Regulation Y under the BHCA, which sets out general provisions on bank holding companies and change in bank control, defines "voting securities" generally as "shares of common or preferred stock, *general or limited partnership shares or interests*, or similar interests."
[7] Section _.3(b)(1).
[8] Section _.3(b)(3)(i)(A).
[9] Section _.3(b)(3).
[10] Section _.6(c).

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PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

This presents a conflict in that, under the insurance exemption, an insurance company should be able to invest in covered funds, whereas under the covered funds provisions a regulated insurance company would be severely restricted in doing this very thing. The Agencies ask in question 132 whether any of the statutory requirements for the insurance exemption should be clarified in the Proposed Rule (and further in question 135 how negative impacts of the Proposed Rule's approach can be mitigated).[11] In response to question 132, HSBC urges the Agencies to remedy the manifest conflict as outlined therein and make clear—in accordance with Congress's stated intent to leave undisturbed the "ordinary business of insurance"—that regulated insurance companies can invest in securities issued by covered funds. The ability to invest in and sell interests in covered funds (as defined in the Proposed Rule) is wholly essential as part of the natural process of "collection and investment of premiums, which are then used to satisfy claims of the insured" as administered and managed by HSBC and all of its international peers that operate regulated insurance companies.[12]

1.4 Give effect in the Proposed Rule to Congress's stated aim that foreign regulated insurance companies be able to utilize the insurance exemption "in compliance with, and subject to, the insurance company laws, regulations and written guidance of the ... jurisdiction in which each such insurance company is domiciled" (question 134)

Section 619 poses a difficult balancing act for the Agencies. On the one hand, the Agencies must protect the safety and soundness of the United States financial system. On the other, the Agencies must "appropriately accommodate the business of insurance within an insurance company."[13]

To make both of these aims possible and ease the burden on the Agencies, Congress formulated a key requirement that to use the insurance exemption a regulated insurance company must act "in compliance with, and subject to, the insurance company laws, regulations and written guidance of the ... jurisdiction in which each such insurance company is domiciled."[14]

To implement this Section 619 requirement in the Proposed Rule in respect of non-US regulated insurance companies, the Agencies require that (1) any such company must be "directly engaged in the business of insurance and subject to regulation by a ... foreign insurance regulator," (2) the insurance company purchases or sells the position solely for its general account, (3) the "purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulation, and written guidance of the ... jurisdiction in which such insurance company is domiciled and (4) that the "appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States, have not jointly determined, after notice and comment, that ... this section is insufficient to protect the safety and soundness of the covered banking entity, or of the financial stability of the United States."[15]

While items (1) through (3) of Section _.6(c) align with requirements in Section 619, elements of requirement (4) introduce a measure of uncertainty for non-U.S. regulated insurance companies that undermines their ability to use the insurance exemption and, as a result, effectively carry out the business of insurance. The Agencies' reference to the FSOC consultation is reasonable. In its assessment of regulatory oversight for foreign insurance companies, FSOC emphasized that insurance companies are "traditionally subjected to a different but stringent regulatory treatment and oversight"[16] and insurance companies outside of the U.S. are similarly subject to very rigorous regulatory frameworks.

[11] Proposed Rule Release at 68880.
[12] 156 Cong. Rec. S5896 (daily ed. July 15, 2010) (*emphasis* added). This reasoning aligns with Section 619's acknowledgement of "rules of international regulatory comity by permitting foreign banks, regulated and backed by foreign taxpayers, in the course of operating outside of the United States to engage in activities permitted under relevant foreign law."
[13] Subsection (b)(1)(F) of Section 619.
[14] Subsection (d)(1)(F) of Section 619.
[15] Section _.6(c).
[16] FSOC Study at 46 (Jan. 2011)

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
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The effective requirement under (4) that "relevant insurance commissioners of the States, have not jointly determined" that allowing a foreign insurance company to use the insurance exemption would cause specific or systemic risk is impractical, unreasonable and unnecessary and could, in the case of a foreign insurance company, be interpreted to mean that all 50 State insurance commissioners would need to be consulted. In question 134, the Agencies ask whether insurance company regulations in any particular State or other jurisdiction fail to protect the safety and integrity of the U.S. system or a particular banking entity. The effect of Section _.6(c)(4) is potentially to make all 50 U.S. State insurance regulators key arbiters of this question, passing judgment on foreign insurance regimes. This is a task for which U.S. State insurance regulators have neither the jurisdiction nor the expertise. Moreover, the public policy considerations that allow the business of insurance to be generally left to U.S. State insurance regulators should extend to foreign insurance regulators as well. They are better placed to know their respective insurance markets and will know the issues that arise in respect of solvency and good investment practices for their domiciled insurance companies. Ignoring these facts would only serve to put these insurance companies affiliated with FDIC-insured banking entities at a competitive disadvantage because they happen to be caught by the Proposed Rule.

HSBC urges the Agencies to amend Section _.6(c)(4) so that FSOC has general oversight into matters of systemic risk and State insurance regulators only have discretion with respect to insurance companies over which they have jurisdictional authority. We would also recommend that FSOC consults with relevant foreign insurance regulators before deciding whether to limit activities that are engaged in by foreign insurance companies in one or more non.U.S. jurisdictions. Accordingly, we ask that Section _.6(c)(4) be replaced with the following:

> (4) The appropriate Federal banking agencies, after consultation with: (i) the Financial Stability Oversight Council; and (ii) either (A) in respect of an insurance company in a particular State or States, the relevant insurance commissioner or commissioners of that State or States; or (B) in respect of an insurance company regulated in a jurisdiction outside of the United States, any relevant insurance regulator of that jurisdiction and/or professional body or industry organization with knowledge of the conduct and regulation of insurance in that jurisdiction, have not jointly determined, after notice and comment, that this section is insufficient to protect the safety and soundness of the covered banking entity, or of the financial stability of the United States.

This language will allow the Agencies to vindicate Congress's stated aim for foreign regulated insurance companies under Section 619 and in Congressional testimony while simultaneously discharging their duty to safeguard market integrity in the United States.

2. ISSUES RELATED TO THE FOREIGN FUNDS EXEMPTION AND ITS IMPLEMENTATION UNDER THE PROPOSED RULE

The Volcker Rule seeks to protect the safety and soundness of U.S. covered banking entities and the U.S. financial system against systemic risk by restricting certain activities of covered banking entities. The clear Congressional and regulatory intent is to limit the extraterritorial effect of the Volcker Rule and allow for investment by non-U.S. banking entities in non-U.S. covered funds, as demonstrated by the foreign fund exemption in Section 619.

In his account of the Volcker Rule, Senator Merkley explained that Section 619 acknowledges "rules of international regulatory comity by permitting foreign financial institutions, regulated and backed by foreign taxpayers, in the course of operating outside of the United States to engage in activities permitted under relevant

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

foreign law."[17] However, as demonstrated below, the implementation by the Agencies of the foreign funds exemption creates uncertainties that give the Volcker Rule a much broader reach than intended by Congress.

2.1 Refer to section 4(c)(9) and subpart B of Regulation K solely in the context of their QFBO requirements (question 292)

HSBC asks that the Agencies clarify Section _.13(c)(1)(ii) of the Proposed Rule. Under Section _.13(c)(1)(ii), an entity applying for the foreign funds exemption must determine that it qualifies for the exemption. HSBC understands that the Agencies intended to specify the qualifying foreign banking organization (or "**QFBO**") requirements in the Proposed Rule.[18]

As currently drafted, the Proposed Rule might be interpreted to require that a covered banking entity vying to benefit from the covered fund exemption comply with further requirements imposed by Subpart B of Regulation K in addition to qualifying as a QFBO because of a reference to "4(c) of the BCH Act." Section 4(c) of the BHC Act, would require the following:

> With respect to a covered banking entity that is a foreign banking organization, the banking entity is a qualifying foreign banking organization and is conducting the purchase or sale in compliance with subpart B of the Board's Regulation K (12 CFR 211.20 through 211.30)

HSBC urges the Agencies to clarify any additional requirements that an entity would be expected to comply with as a QFBO in order to benefit from the foreign funds exemption.

2.2 Change the definition and use of "covered fund" so that it works appropriately in the context of the foreign funds exemption (questions 224, 291, 294)

Currently, the Proposed Rule includes as a covered fund any fund whether organized or offered in the U.S. or abroad that would qualify as a fund under the Investment Company Act but for the fact that it is organized or offered outside of the U.S. to non-U.S. residents.[19] The current definition is overinclusive and vitiates Congress' intent under Section 619 to respect the "rules of international regulatory comity" by allowing foreign financial institutions that operate outside of the U.S. "to engage in activities permitted under their relevant foreign law."

The Agencies' intent was to include in the definition of covered funds "similar funds" to private equity and hedge funds given that they are generally managed and structured similarly to a covered fund, except that they are not usually subject to the Federal securities laws when they are not organized in the United States or offered to residents of the U.S.[20]

This implementation is flawed since it assumes that all private funds around the world function like U.S. private equity and hedge funds. Many regulated foreign funds function differently from U.S. funds and would be caught under the Proposed Rule definition, thereby prohibiting covered banking entities from investing in such funds. HSBC does not believe that this was Congress or the Agencies' intent. Indeed, those funds are monitored by foreign regulators and prohibiting financial institutions located in those foreign jurisdictions from investing in

[17] 156 Cong. Rec. S5897 (daily ed. July 15, 2010).

[18] The Proposed Rule defines a "qualifying foreign banking organization" as "a foreign banking organization that qualifies as such under § 211.23(a) of the Board's Regulation K (12 CFR 211.23(a))."

[19] Precisely, Section _.10(b)(1) of the Proposed Rule states:

> Any issuer, as defined in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(22)), that is organized or offered outside of the United States that would be a covered fund as defined in paragraphs (b)(1)(i), (ii), or (iv) of this section, were it organized or offered under the laws, or offered to one or more residents, of the United States or of one or more States.

[20] When the Agencies refer to foreign funds that are "generally managed and structured similar to a covered fund," HSBC assumes that they mean "generally managed and structured similar to an issuer that would be an investment company as defined in the Investment Company Act but for section 3(c)(1) or 3(c)(7) of that Act." where this not the case, HSBC believes that the language would be circular.

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

them merely due to an affiliation with an FDIC insured entity could not have been the Congressional intent since such approach violates the "rules of international regulatory comity."

HSBC asks that the Agencies amend Section _.10(b)(1) of the Proposed Rule to, at the very least, exempt foreign regulated investment companies from the definition of covered fund in recognition that the risk linked to investments in these entities is more properly managed by foreign regulators familiar with both the foreign investors and the foreign funds.

2.3 Change the definition of "resident of the United States" to instead refer to Rule 902 of Regulation S (question 295)

The agencies should reassess the definition of "resident of the United States" to instead refer to Rule 902 of Regulation S of the SEC to ensure more certainty. Currently, the Proposed Rule defines a "resident of the United States" in Section _.2(t) of the Proposed Rule in a manner similar, but not identical, to the SEC definition of a "U.S. person" in Regulation S. Such difference can create confusion especially for foreign covered banking entities looking to invest in foreign funds. Those foreign entities will have to request documentation insuring that the fund does not offer investment to any "resident of the United States" as defined in the Proposed Rule, which may not be consistent with the restrictions applicable in the fund's equity offerings. The term "U.S. person as defined by Regulation S" is already widely used and integrated in existing fund documentation and could be easily adopted in this context.

By defining a "resident of the United States" by reference to the Regulation S definition of a "U.S. person" in the Proposed Rule, the Agencies could avoid confusion and interpretive issues by drawing upon the market's familiarity with the term and build upon the substantial body of case law and SEC interpretation and commentary that provide meaning to the term "U.S. person."

2.4 Reassess the scope of activities that must be performed "solely outside of the United States" (question 293)

The final requirement that a covered foreign banking entity must observe when seeking to apply the foreign funds exemption is that the relevant sponsoring or investment activities must take place "solely outside of the United States." The Agencies define this phrase in three steps at section _.13(c)(3) of the Proposed Rule:

(i) the covered banking entity engaging in the activity is not organized under the laws of the United States or of one or more States;

(ii) no subsidiary, affiliate, or employee of the covered banking entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States or in one or more States; and

(iii) no ownership interest in such covered fund is offered for sale or sold to a resident of the United States.

Referring to these provisions, question 293 asks whether they are "effective and sufficiently clear." HSBC believes that the effectiveness and clarity of the proposed provisions could be significantly improved.

As an initial observation, HSBC notes that prongs (i) and (iii) of _.13(c)(3) are each redundant with other provisions of the Proposed Rule. Section _.13(c)(3)(i) overlaps with what sections _.13(c)(1)(i) and (ii) already require, and section _.13(c)(3)(iii) repeats verbatim the wording of _.13(c)(1)(iii). This leaves us with _.13(c)(3)(ii), which (with its requirement that "no subsidiary, affiliate, or employee of the covered banking

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

entity that is involved in the offer or sale of an ownership interest in the covered fund is incorporated or physically located in the United States") goes beyond the language and approach suggested by Section 619.[21]

The language at _.13(c)(3)(ii) seems to stem generally from the sentiment embodied in Senator Merkley's remark that Section 619 seeks to "maintain a level playing field by prohibiting a foreign financial institution from improperly offering its hedge fund and private equity fund services to U.S. persons when such offering could not be made in the United States."[22] The Proposed Rule is too broad, however, and includes all employees, subsidiaries and affiliates in the United States, creating counterintuitive results.

The Agencies have recognized that foreign banking entities may engage in some activities in the United States, such as "back office functions," which do not constitute selling to U.S. investors and therefore would not affect availability of the foreign funds exemption, commenting specifically that "an employee or entity with no customer relationship and involved solely in providing administrative services or so-called 'back office' functions to the fund as incident to the activity permitted under the foreign funds exemption (such as clearing and settlement or maintaining and preserving records of the fund with respect to a transaction where no ownership interest is offered for sale or sold to a resident of the United States) would not be subject to this requirement."

Beyond this explicit exemption for back office functions, HSBC asks that the Agencies give further guidance in respect of the "solely outside of the United States" requirement to clarify that all activities that do not directly involve selling or offering interests in a covered fund to U.S. residents will not be subject to its requirements. While Senator Merkley's remarks make clear that a foreign banking entity should not offer or sell interests in a covered fund to U.S. persons if it wishes to benefit from Congress's natural desire to avoid undue extraterritorial reach, HSBC notes that many activities integral to sponsoring and managing a fund do not fall under the rubric of "offering or selling to" investors. However, a portfolio management team typically consists of a number of individuals, and often, only a small number of them is engaged in selling activities. Examples of such non-selling activities might include establishment of fund vehicles, day-to-day management and deal sourcing, tax structuring, obtaining licenses, interfacing with regulators and many other activities. None of these activities will necessarily involve interaction with investors who are U.S. persons and therefore investment in a foreign covered fund should not be prohibited solely by virtue of the location in the U.S. of personnel that is not involved in any sales activities.

In providing this clarification, the Agencies will continue to maintain the safety and integrity of the U.S. markets while simultaneously allowing U.S. financial centers like New York to retain jobs for individuals who work for foreign banking entities and their affiliates performing non-selling activities in respect of covered funds which are offered outside of the United States. Prohibiting these non-selling activities will cause non-U.S. banking entities to move these functions overseas, creating unnecessary costs for the institutions and resulting in the loss of a large number of jobs in the U.S. As noted above, a portfolio management team will often consist of a large number of individuals, only a small number of whom are involved in sales activities. However, a non-U.S. financial institution will have little incentive to keep personnel in the U.S. if a portion of a management team is required to be housed in a non-U.S. jurisdiction, resulting in a ripple effect of job losses even outside of the sales sector. Such a result would not only harm the U.S. job market, it would also undermine the purpose of the rule by moving operations outside of the U.S. and, as a result, making the operation of such institutions more opaque to U.S. regulators.

[21] Note our suggested changes to _.13(c)(3)(ii) at sub-section B above.
[22] 156 Cong. Rec. S5897 (daily ed. July 15, 2010).

HSBC Life (International) Limited
18/F, Tower 1, HSBC Centre, 1 Sham Mong Road, Kowloon, Hong Kong
PO Box 74525, Kowloon Central Post Office, Kowloon, Hong Kong
Tel: (852) 2288 6622 Fax: (852) 2806 1892

HSBC

HSBC Insurance

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We would be pleased to provide further information or assistance at the request of the Agencies or their staff. Please do not hesitate to contact me at HSBC if you should have any questions regarding the foregoing.

Respectfully submitted,

Paul Beresford
Chief Actuary
HSBC Life (International) Limited

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